

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION

Plaintiff,

ELODIA SANCHEZ

Plaintiff-Intervenor,

v.

EVANS FRUIT CO., INC.

Defendant,

and

JUAN MARIN and ANGELITA  
MARIN, a marital community,

Defendants-Intervenors.

NO. CV-10-3033-LRS

**ORDER BIFURCATING  
TRIAL AND DENYING  
MOTION FOR PROTECTION  
ORDER**

In its “Order Re Motion For Protection Order” (ECF No. 266), filed April 11, 2011, this court found that immigration status is relevant to calculation of certain actual pecuniary damages (i.e., back pay), but proposed a bifurcation where there would be separate trials on liability and damages. Because immigration status is irrelevant to liability, the court concluded there was significant danger that evidence of the same admitted at a single trial on both liability and damages could interfere with the jury’s duty to engage in reasoned

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1 deliberation regarding liability. The court directed the parties to serve and file  
2 memoranda regarding its proposed bifurcation. Plaintiff-Intervenor's "Motion  
3 For Protection Order" (Ct. Rec. 246) was stayed pending the court's  
4 determination regarding bifurcation.

## 6 **BIFURCATION**

7 Plaintiff-Intervenor states that in order to avoid bifurcation, which she  
8 contends "would be overly burdensome given the class nature of the case and  
9 the fact that Plaintiff-Intervenor is the only plaintiff asserting back pay," she is  
10 willing to withdraw her claim for back pay. Furthermore, in an effort to avoid  
11 having to disclose private medical information, Plaintiff-Intervenor says she is  
12 willing to withdraw her claim for Negligent Infliction of Emotional Distress  
13 (NIED).

14 Plaintiff EEOC asserts the issue of bifurcation is moot in light of  
15 Plaintiff-Intervenor's willingness to withdraw her back pay and NIED claims,  
16 and this court's finding that immigration status is irrelevant to liability and non-  
17 pecuniary damages. EEOC says it is appropriate that "one jury should evaluate  
18 evidence as to all liability claims and all claims for non-pecuniary compensatory  
19 damages and punitive damages." The EEOC's response suggests that it is also  
20 willing to withdraw pecuniary damages claims on behalf of the complaining  
21 parties it represents. Such claims are clearly asserted in the EEOC's Complaint  
22 (ECF No. 1 at p. 8, Paragraph C.): "[C]ompensation for past and future  
23 pecuniary losses, including past and future out-of-pocket expenses."

24 Defendant Evans Fruit Co. asks that the trial "be phased such that a single  
25 jury will hear evidence on liability and, if necessary, the same jury will

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1 immediately hear evidence on damages.” Defendant contends immigration  
2 status is relevant not only to claims for pecuniary loss, but also to claims for  
3 emotional distress.

4 In a footnote in its previous order, the court deemed immigration status  
5 “clearly irrelevant to non-pecuniary losses, such as emotional distress  
6 damages.” (ECF No. 266 at p. 3, fn. 1). Upon further consideration, including  
7 examination of the authorities cited by Defendant, the court concludes  
8 immigration status does have potential relevance to emotional distress damages,  
9 although whether it is admitted into evidence at trial will depend on whether its  
10 probative value is outweighed by its risk of unfair prejudice, Fed. R. Evid. 403,  
11 and whether a limiting instruction will be adequate to prevent unfair prejudice.  
12 Admissibility need not be determined now. That said, because immigration  
13 status has potential relevance to damages, it is a legitimate area of discovery and  
14 the court will allow the same, subject to an appropriate protective order which  
15 ensures the information obtained remains confidential.

16 Immigration status is irrelevant to the liability determination jurors will  
17 need to make. In order to avoid even the remotest possibility of such  
18 information tainting the liability determination, the first phase of the trial will be  
19 restricted to liability issues only. At this juncture, the court sees no reason why  
20 any evidence of immigration status would be admissible in the first (liability)  
21 phase of trial. If the jury determines there is liability, it will then be presented  
22 with evidence in a second phase dedicated to determination of compensatory  
23 and punitive damages. A single jury will determine both liability and damages,  
24 albeit in two separate phases. The court declines to bifurcate liability and  
25 damages discovery, considering the expense and inefficiencies that would be

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involved in Defendant re-deposing the same claimants after any finding of liability.

Because the court has settled upon this manner of bifurcation, it will not consider back pay claims to have been withdrawn by Plaintiff-Intervenor and the EEOC, and they may proceed with those claims in the second (damages) phase of the trial. Of course, claims for emotional distress damages are also preserved for the second (damages) phase of the trial. Plaintiff-Intervenor has asserted an NIED claim which is not merely an element of damages, but an independent basis of tort liability. Recovery pursuant to an NIED claim cannot be had where the factual basis for that claim is the same as the sexual harassment or discrimination claim. *Haubry v. Snow*, 106 Wn.App. 666, 678, 31 P.3d 1186 (2001). Because the factual basis for Plaintiff-Intervenor's NIED claim is the same as her WLAD sexual discrimination claim, her avenue for recovery is limited to her sexual discrimination claim and her NIED claim will not be at issue in the first phase of the trial dealing with liability. If the jury finds in the first phase that Defendant is liable to the Plaintiff-Intervenor on her sexual discrimination claim, it will determine in the second phase of the trial the amount of emotional distress damages to which Plaintiff-Intervenor is entitled.

## **DISCOVERY**

Because the court assumes pecuniary damages claims will remain in this case, and because of the relevance of immigration status to pecuniary and non-pecuniary damages issues to be litigated in the second phase of the trial, Plaintiff-Intervenor shall provide complete answers to Interrogatory Nos. 1, 3, 4, 5 and 6, and Requests For Production Nos. 1 (tax records), 4 (claims), and

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1 6(work authorization documents).

2 The court also directs Plaintiff-Intervenor to answer Interrogatory No. 12  
3 asking her to identify all health care professionals who have treated or examined  
4 her since January 1, 2000. Plaintiff-Intervenor has put her medical condition  
5 into issue by seeking emotional distress damages. The fact she has not seen a  
6 mental health provider and there are no specific mental health records pertaining  
7 to Plaintiff-Intervenor is not dispositive. It is possible Plaintiff-Intervenor's  
8 mental condition has been addressed by other health care practitioners who have  
9 treated or examined her. Plaintiff-Intervenor indicates her emotional distress  
10 has included physical manifestations such as headaches and nosebleeds. (Ex. B  
11 to ECF No. 261 at pp. 10-11). Moreover, the possibility exists that Plaintiff-  
12 Intervenor has health issues which have arguably contributed to emotional  
13 distress she has experienced or is experiencing.

14 Defendant's Interrogatory No. 2 asks the Plaintiff-Intervenor to identify  
15 all home phone and cell phone numbers she has used since January 1, 2006.  
16 Request For Production No. 7 asks Plaintiff-Intervenor to produce copies of cell  
17 phone records from January 1, 2006. The apparent reason for Defendant  
18 seeking this information, as well as all addresses at which the Plaintiff-  
19 Intervenor has resided since January 1, 2006<sup>1</sup>, is to determine whether 911  
20 domestic dispute calls were made by the Plaintiff-Intervenor. The court recalls  
21 that at the preliminary injunction hearing, there was questioning of the Plaintiff-  
22 Intervenor and at least one other witness regarding this issue. As this issue may  
23 lead to admissible evidence regarding potential contributors to Plaintiff-

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26 <sup>1</sup> The addresses are the subject of Interrogatory No. 1.

1 Intervenor's alleged emotional distress, the court will also direct that complete  
2 answers be provided to Interrogatory No. 2 and Request For Production No. 7.

3  
4 **CONCLUSION**

5 Trial in this matter will be bifurcated as set forth above. Plaintiff-  
6 Intervenor's Motion For Protection Order (ECF No. 246) is **DENIED**. The  
7 answers and the documents sought shall be provided within fifteen (15) days of  
8 the date of this order, subject to an agreed protective order which ensures the  
9 confidentiality of the same and prohibits its use outside of this litigation. If the  
10 parties cannot agree on a protective order, they will notify the court and it will  
11 resolve the dispute.

12 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
13 this order and to provide copies to counsel of record.

14 **DATED** this 25th day of May, 2011.

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16 *s/Lonny R. Suko*

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LONNY R. SUKO  
United States District Court Judge

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